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No. 81-1617

In the Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA, PETITIONER

v.

RAYMOND J. PLACE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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1. Respondent's (Br. 12-17) and amici curiae's (Br. 12-47)[1] primary assertion is that it is a fundamental principle of the Fourth Amendment that "seizures" may not be effected on less than probable cause. This broad proposition is completely indefensible. As explained in our opening brief (at 15-20), since *Terry* v. *Ohio*, 392 U.S. 1 (1968), it is black letter law that a temporary investigative detention of an individual, which is a "seizure" within the meaning of the Fourth Amendment, may be effected on the basis of less than probable cause, *i.e.*, a reasonable suspicion of criminal activity. And subsequent cases, such as *Michigan* v. *Summers*, 452 U.S. 692, 700 & n.12 (1981), make clear that there is no merit to the contention (Resp. Br. 17-23; Amicus

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[1] References to "amici curiae" and "Amicus Br." refer to the brief filed by the American Civil Liberties Union and the New York Civil Liberties Union.

Br. 37-40) that this principle is limited to the particular facts of *Terry*. Rather, an investigative detention on less than probable cause satisfies the requirements of the Fourth Amendment if it meets the "reasonableness" standard of that provision, and that determination depends on a balancing of the gravity of the intrusion against the legitimate government interests served thereby. See, *e.g.*, *Delaware* v. *Prouse*, 440 U.S. 648, 653-655 (1979); *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 878 (1975).

a. To support their contention that even temporary seizures almost invariably require probable cause, both respondent and amici rely on numerous cases holding that *searches* of buildings or of personal effects require probable cause. These cases, of course, are completely inapposite. Each of the older cases relied upon (see Resp. Br. 13-16; Amicus Br. 27-31) involved the seizure of personal property incident to a warrantless search of a home, office, or similar building. The Court in those cases plainly did not consider at all the propriety of the seizure standing apart from the antecedent search; indeed, if it had, it undoubtedly would have concluded that the seizures themselves were justified, albeit tainted by the illegal search. Clearly then, those cases cast no light on the question presented here — whether law enforcement officers may temporarily detain for purposes of further investigation personal property found in a public place, based on a reasonable suspicion that it contains contraband.[2]

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[2]Amici's assertion (Br. 31) that *Taylor* v. *United States*, 286 U.S. 1 (1932) is "closely analogous" to this case is quite remarkable. In *Taylor*, the Court held (and the Solicitor General agreed (*id.* at 5)) that it was an "unreasonable" search and seizure for police to break into a garage without a warrant, search it, and seize the contraband that they found there.

The recent cases relied upon (see Resp. Br. 16-17; Amicus Br. 33-38) are equally irrelevant. In fact, those cases generally focus only on the procedural question whether a warrant is required for a particular search; that the substantive standard required for the search is probable cause was not in dispute. See, *e.g., United States* v. *Ross,* No. 80-2209 (June 1, 1982); *United States* v. *Chadwick,* 433 U.S. 1 (1977).[3] The Warrant Clause of the Fourth Amendment plays no role in this case, of course; neither respondent nor amici dispute the proposition (see Pet. Br. 19-20) that a warrant generally is not required for the permanent seizure in a public place of either a person or his property, much less for a temporary detention. In any event, we do not dispute that a permanent seizure of property must be justified by probable cause, just like an arrest. Rather, we contend that, like an investigative detention of a person, a temporary investigative detention of property may be reasonable if based on reasonable suspicion.

The underlying premise of respondent's reliance on these search cases is that the probable cause standard applies with equal force to seizures as to searches, even temporary seizures (see, *e.g.,* Resp. Br. 11, 16-17).[4] As noted in our opening

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[3]Notwithstanding amici's heavy reliance (see, *e.g.,* Br. 8-10, 47-49, 53-54 & n.34) on *Torres* v. *Puerto Rico,* 442 U.S. 465 (1979), that case has no relevance whatsoever to this one. In *Torres,* the Court struck down a Puerto Rico statute authorizing police to search the luggage of any person arriving from the United States. The Court rejected the arguments that the Fourth Amendment did not apply in Puerto Rico (*id.* at 468-471), and that the searches were analogous either to customs searches at international borders or to administrative inspections (*id.* at 472-473). Its ultimate conclusion that the searches therefore were "unreasonable" within the meaning of the Fourth Amendment in the absence of probable cause followed inexorably from prior precedent (see *id.* at 472) and provides no support for respondent's position here.

[4]Contrary to respondent's assertion (Br. 17), the seizure in this case was for the purpose of conducting an investigation, not a search. At the time the luggage was seized, it was not clear that it would ever be

brief (at 22), that equation makes little sense. A search involves a permanent invasion of privacy; once an individual's personal effects have been examined, the information that he may have wished to protect cannot be made private again. A seizure, on the other hand, involves an interference only with a person's freedom of movement or with his possessory interest in property and only for the period of the seizure; that interference ends when the seizure is terminated. Because the consequences of a search are both more lasting and more intrusive than those of a seizure of limited duration, a temporary detention may reasonably be justified by a level of suspicion that would not reasonably justify a search. Cf. *Payton* v. *New York*, 445 U.S. 573, 587 (1980) (warrantless seizure in public place "presumptively reasonable" because no invasion of privacy); *Warden* v. *Hayden*, 387 U.S. 294, 304 (1967) (principal object of Fourth Amendment is protection of privacy); *Walter* v. *United States*, 447 U.S. 649, 654 (1980) (footnote omitted) ("an officer's authority to possess a package is distinct from his authority to examine its contents"). For example, individuals in an automobile may be stopped for questioning (*i.e.*, "seized") on the basis of suspicion that would not justify a search of the car. See *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 561, 567 (1976); *United States* v. *Ortiz*, 422 U.S. 891, 896-897 (1975); compare *United States* v. *Brignoni-Ponce*, *supra*, 422 U.S. at 884 (stop may be based on reasonable suspicion), with *Almeida-Sanchez* v. *United States*, 413 U.S. 266, 269-270 (1973) (search requires probable cause).

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searched. The search of respondent's luggage that eventually took place was based on probable cause and pursuant to a warrant, and there can be no challenge to its validity except by attacking the antecedent seizure. The cases cited by respondent (Br. 17), in which the search itself was challenged as unreasonable, do not involve the validity of a seizure independent of a search and are inapposite here.

b. Amici also maintain (Br. 16-26) that the origins of the Fourth Amendment demonstrate that one of its primary purposes was to forbid any seizure without probable cause — a purpose that would be "swallow[ed]" (Amicus Br. 11) if the decision below is affirmed. In fact, the historical background of the Amendment lends no support to this thesis.

As this Court has discussed on other occasions, the Fourth Amendment was the constitutional response to two hated practices of the 18th Century — the writs of assistance that had given customs officials blanket authority to search where they pleased for goods smuggled into the colonies in violation of British tax laws, and the general warrants in England that had allowed the blanket search of the premises of all persons connected with publication of a particular libel. See *United States* v. *Chadwick*, 433 U.S. 1, 7-8 (1977); *Stanford* v. *Texas*, 379 U.S. 476, 481-484 (1965); see generally N. Lasson, *The History and Development of the Fourth Amendment to the United States Constitution* (1937); T. Taylor, *Two Studies in Constitutional Interpretation*, 24-44 (1969); Fraenkel, *Concerning Searches and Seizures*, 34 Harv. L. Rev. 361-365 (1921). Thus, the particular abuses at which the Fourth Amendment was directed involved the use of overbroad warrants to authorize an entry into premises, usually the home, for the purpose of conducting a search and seizing evidence. The response of the drafters of the Bill of Rights was the Warrant Clause, which requires specificity in search warrants and establishes the probable cause standard for their issuance.

Although it is true that these 18th Century abuses concerned the seizures of property from private areas as well as the blanket searches authorized by the general warrants, it is clear that the drafters of the Fourth Amendment did not direct any particular attention toward the seizure of personal property voluntarily removed by its owner to a public place, much less the temporary detention of such property

involved in this case. Such a warrantless seizure is governed not by the Warrant Clause, but by the Fourth Amendment's proscription against "*unreasonable* searches and seizures" (emphasis added). Amici's assertion (Br. 17, 24-25) that the drafters of the Fourth Amendment contemplated that any seizure would be "unreasonable" under this clause in the absence of probable cause does not accord with the text of the Constitution (cf. *South Dakota* v. *Opperman*, 428 U.S. 364, 370 n.5 (1976) (warrant requirement linked textually to probable cause standard)) and is not supported by any authority at all.[5]

To the contrary, there is ample evidence that the drafters of the Fourth Amendment contemplated that warrantless searches and seizures could be reasonable in the absence of probable cause. See generally T. Taylor, *Two Studies in Constitutional Interpretation, supra*, at 39-44. The customs statute enacted by the first Congress authorized designated officials to search ships suspected of containing goods subject to duty and to seize any such goods found. These searches and seizures could be conducted without a warrant on the basis of "reason to suspect" the concealment of such goods. See Act of July 31, 1789, ch. 5, Section 24, 1 Stat. 43. This recognition of the right to conduct warrantless seizures — indeed, searches — in the absence of probable cause carries great weight as a matter of constitutional interpretation because it was enacted by the same Congress that proposed the Fourth Amendment. See *Boyd* v. *United States*, 116 U.S. 616, 623 (1886). In light of this statute, it seems eminently reasonable that a police officer should be

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[5]Amici erroneously cite (Br. 24 n.18) N. Lasson, *supra*, for the proposition that the version of the Fourth Amendment contained in the 1776 Pennsylvania Declaration of Rights impliedly protected against all searches and seizures not based on probable cause. In fact, Professor Lasson states that "[t]he word '*unreasonable*' is imputed." N. Lasson, *supra*, at 81 n.11 (emphasis added).

permitted temporarily to detain suspected contraband found in a public place for the purpose of further investigation that will confirm or dispel his suspicion. At a minimum, it is clear that the history of the Fourth Amendment does not suggest an irreducible prerequisite of probable cause for all conduct that constitutes a "seizure."

2. Respondent contends (Br. 19) that it is per se "unreasonable" for an investigative detention of personal property based on reasonable suspicion to continue any longer than could a *Terry* stop of a person. As explained in our opening brief (at 20-26), this assertion defies common sense because a baggage detention unquestionably is significantly less intrusive than a detention of a person. The basis for respondent's contention is his repeated assertion (Resp. Br. 19-20, 21, 22) that a traveler necessarily is "immobilized" if his luggage is detained. This statement misconceives the procedure that occurred here; the whole point of an investigative detention of luggage is to permit a police officer to confirm or dispel his reasonable suspicion of criminal activity *while allowing the person involved to proceed on his way*. The record unequivocally demonstrates that that is precisely what happened here; respondent chose not to remain with the DEA agents while they arranged for the dog sniff, explaining that he had "pressing engagements" (see J.A. 6).

As noted in our opening brief (at 20-21), this Court has already recognized in *United States* v. *Van Leeuwen*, 397 U.S. 249 (1970), the principle that police may effect an investigative detention of luggage independent of any seizure of the person. Respondent's proferred distinction of *Van Leeuwen* (Resp. Br. 21-22) does not undermine this principle. The fact that the investigation in this case focused on the detained luggage itself raises an independent question whether that investigation comported with the Fourth

Amendment,[6] but obviously it is irrelevant to the validity of the detention itself, which turns on a balancing of the intrusion occasioned by the *detention* against the public purpose served thereby. Amici suggest (Br. 41-43) that *Van Leeuwen* is inapposite here because respondent's suitcase was seized while it was in his possession. But surely the question presented here would not be significantly different if the DEA agents had seized the luggage directly from the baggage carousel instead of shortly after respondent claimed it. The critical question is still the reasonableness of the intrusion created by the deprivation of respondent's possession of his luggage for the period of the detention. As explained in our opening brief (at 26-36), that limited intrusion was justified by the strong government interest in maintaining the status quo for a limited time in order to conduct a specific course of investigation to confirm or dispel the reasonable suspicion that the luggage contained contraband.

3. Respondent and amici object that investigative detentions of luggage on the basis of reasonable suspicion are necessarily "unreasonable" because they are an "arbitrary interference by law enforcement authorities" (Resp. Br. 20) or are committed to an officer's "unbridled discretion" (Amicus Br. 51, 60-62). This objection is without foundation. There was nothing arbitrary about the decision to detain respondent's luggage. It rested upon a well established Fourth Amendment standard, namely, articulable facts creating a reasonable suspicion of criminal activity,

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[6]For example, a search of respondent's luggage based on reasonable suspicion would have been unlawful. There is no question, however, of the lawfulness of the dog sniff performed here. The overwhelming weight of authority holds that a dog sniff is not a "search" at all (see, *e.g., United States* v. *Johnson*, 660 F.2d 21, 22 (2d Cir. 1981)), and even the most restrictive view is that a dog sniff may be performed on the basis of reasonable suspicion. See *United States* v. *Beale*, 674 F.2d 1327 (9th Cir. 1982), petition for cert. pending, No. 82-674. See also Pet. Br. 31 n.18.

and the finding of reasonable suspicion was subject to judicial review. See *Terry* v. *Ohio, supra,* 392 U.S. at 21-22.

It is true, of course, that the initial finding of reasonable suspicion was made by law enforcement officers, not by a neutral and detached magistrate (cf. *Dunaway* v. *New York,* 442 U.S. 200, 213-214 (1979)), but surely that cannot suggest that the determination was "arbitrary." The situation in which the need for an investigative detention arises obviously calls for the law enforcement officer to make the initial determination of suspicion, and there is no contention that resort to the prophylactic measure of a warrant is appropriate in this context. Indeed, if it is the exercise of judgment by law enforcement officers that constitutes "arbitrariness," the situation would not be improved at all by accepting respondent's position and imposing the higher standard of probable cause.

4. Amici mistakenly assert (Br. 52-54) that the justification for the temporary detention here is different from that recognized in *Terry* and its progeny. To the contrary, the government interest involved here — the prevention of a crime that police reasonably suspect is about to be committed — is precisely the same interest that justified the stops in *Terry* and its progeny. See also *Michigan* v. *Summers, supra,* 452 U.S. at 698-701; *United States* v. *Cortez,* 449 U.S. 411, 417 (1981); *United States* v. *Brignoni-Ponce, supra,* 422 U.S. at 878-882. As the Court stated in *Adams* v. *Williams,* 407 U.S. 143, 145 (1972), "[t]he Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape."

CONCLUSION

For the foregoing reasons and those stated in our opening brief, it is respectfully submitted that the judgment of the court of appeals should be reversed.

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